Office-Supreme Court, U.S.
FILED
SEP 20 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-990

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS; PHILLIP RUNKEL, Superintendent of Public Instruction of the State of Michigan; STATE BOARD OF EDUCATION OF THE STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer of the State of Michigan; IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE and LINDA BYLSMA, ROBERT and PENELOPE COMER, CLARENCE and ROSALEE COVERT, SCIPUO and JANICE FLOWERS, JOHN and SHIRLEY LEESTMA,

Petitioners,

-vs-

PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS; PATRICIA DAVIS; FREDERICK L. SCHWASS and WALTER BERGMAN,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

Joint Reply Brief for Petitioners

Frank J. Kelley
Attorney General
Louis J. Caruso*
Solicitor General
Gerald F. Young
Assistant Attorney General
Kenneth F. Ripple
Special Assistant Attorney General
Attorneys for Petitioners
Runkel, et al
Business Address:
750 Law Building
525 West Ottawa
Lansing, MI 48913
(517) 373-1124

William S. Farr
John R. Oostema*
Kenneth F. Ripple (Special Counsel)
Attorneys for Petitioner School
District of the City of Grand Rapids
Business Address:
3rd Floor Campau Square Bldg.
180 Monroe, N.W.
Grand Rapids, MI 49503
(616) 459-3355

Stuart D. Hubbell*
Kenneth F. Ripple (Special Counsel)
Attorneys for Petitioners
Aguilar, et al
Business Address:
400 E. Eighth
Traverse City, MI 49684
(616) 947-5600

*Counsel of Record

Dated: September 17, 1984

PRINTED BY SPEAKER-HINES AND THOMAS, INC. - LANSING, MICHIGAN—1984

TABLE OF CONTENTS

	Page
Table of Contents	i
Index of Authorities	ii
I. Introduction—Respondents' *Per Se* Approach	1
II. Scope of Appeal	3
III. Consequences of *Per Se* Rule—Exaggeration Through Mischaracterization	5
A. The Alleged Teachers' Salary Supplement	6
B. Alleged Racial Segregation	7
C. Impact on Public Education	8
IV. Consequences of the *Per Se* Rule—Ignoring the Record	9
A. Student Body Identity	9
B. Excessive Entanglement	10
1. The Professionalism of the GRPS Teaching Staff	11
2. Administrative Relationships	12
3. Role of Nonpublic School in Teacher Assignments	12
4. Political Divisiveness Along Religious Lines	15
Conclusion	19

INDEX OF AUTHORITIES

Cases Page

Board of Education of Detroit v. *Superintendent of Public Instruction*, 319 Mich. 436, 29 N.W.2d 902 (1947) 18

Committee For Public Education and Religious Liberty v. *Regan*, 444 U.S. 646 (1980) 11, 19

Earley v. *DiCenso*, 403 U.S. 602 (1972) 6

Estin v. *Estin*, 334 U.S. 541 (1947) 2, 5

Higgins v. *Board of Education of Grand Rapids*, 508 F.2d 779 (6th Cir. 1974) 7

Huron-Clinton Metropolitan Authority v. *Boards of Supervisors*, 300 Mich. 1, 1 N.W.2d 430 (1942) 18

Jurva v. *Attorney General*, 419 Mich. 209 (1984) 18

Lemon v. *Kurtzman*, 403 U.S. 602 (1972) 11

Lynch v. *Donnelly*, —— U.S. ——, 104 S. Ct. 1355 (1984) 15, 18

McDaniel v. *Paty*, 435 U.S. 618 (1978) 7

Meek v. *Pittenger*, 421 U.S. 349 (1975) 8

Mueller v. *Allen*, —— U.S. ——, 103 S. Ct. 3062 (1983) 8, 15

New State Ice Co. v. *Liebmann*, 285 U.S. 262 (1932) 19

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 8

Regents of the University of Michigan v. *Labor Mediation Board*, 18 Mich. App. 485, 171 N.W.2d 477 (1969) 18

Senghas v. *L'Anse Creuse Public Schools*, 368 Mich. 557, 118 N.W.2d 975 (1962) 18

Traverse City School District v. *Attorney General*, 384 Mich. 390, 185 N.W.2d 9 (1971) 18

Page

Wheeler v. *Barrera*, 417 U.S. 402 (1974) 10

Wolman v. *Walter*, 433 U.S. 229 (1977) 8, 9, 12, 17

Constitutional Provisions

Mich. Const. art. 8, §3 18

Mich. Const. art. 9, §17 18

Statutes

Mich. Comp. Laws §380.1282 (1979) 18

No. 83-990

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS; PHILLIP RUNKEL, Superintendent of Public Instruction of the State of Michigan; STATE BOARD OF EDUCATION OF THE STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer of the State of Michigan; IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE and LINDA BYLSMA, ROBERT and PENELOPE COMER, CLARENCE and ROSALEE COVERT, SCIPUO and JANICE FLOWERS, JOHN and SHIRLEY LEESTMA,

Petitioners,

-vs-

PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS; PATRICIA DAVIS; FREDERICK L. SCHWASS and WALTER BERGMAN,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

Joint Reply Brief for Petitioners

I. Introduction—Respondents' Per Se Approach

The approach and tone of the submissions of the respondents and their supporting amici emphasize the fundamental disagreement between the parties with respect to how the judiciary ought to harmonize the guarantees of the Religion Clauses with the responsibilities of state and local governments to deliver effectively the educational services which all of their citizens need and pay for through their taxes. Essentially, respondents approach this task very much as the court of

appeals. In broad strokes, they argue that *any* significant contact between *any* religiously-oriented institution and *any* public school system violates the establishment clause—regardless of what a fair assessment of the particular relationship, evaluated in its totality, might demonstrate. On the other hand, petitioners submit that, before a court frustrates a carefully developed local program, it should undertake a more precise review of the good faith efforts of a state legislature and a local school board to reconcile competing constitutional responsibilities. The court must, at the very least, examine the trial record *in its totality* and identify a *specific and actual consequence* which violates establishment clause interests.

Respondents' brief—and those of some of the amici—also suggest, at least implicitly, why some might find reliance on *per se* rules a comfortable approach in Religion Clause cases. Certainly, if one begins with a suspicion of religious institutions or with a belief that the judiciary is incapable of precise and sensitive analysis of Religion Clause issues, reliance on stereotypes quite logically follows. However, the first of these suppositions stands in stark contrast to this Court's frequent acknowledgement of the role of religious institutions in our society. The second is an extraordinary trivialization of the Court's traditional recognition that:

> [T]here are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree."

Estin v. *Estin*, 334 U.S. 541, 545 (1947)

This broad brush approach of the respondents creates, in our view, serious barriers to sound analysis. Therefore, in the

following pages, we shall address briefly the principal areas of distortion. First, we shall deal with the most serious distortion created by respondents' brief—failure to distinguish carefully what issues are presented on appeal and what ones are no longer in the case. Secondly, we shall address, albeit briefly, the rather gross mischaracterizations of the record which respondents' approach has precipitated. These are, of course, rather obvious and perhaps are unworthy of reply. However, their potential for impeding reasoned analysis requires our putting them to rest early on. Finally, we shall demonstrate how respondents' reliance on stereotypes and suppositions—rather than the record—has caused them to present a case which simply does not exist.

II. Scope of Appeal

Respondents and their supporting amici, like the majority opinion of the court of appeals, repeatedly fail in their analysis to make two important distinctions: (1) they fail to distinguish between the Shared Time program and the Community Education program[1]; and (2) they fail to distinguish between those classes in each program which are subject to appeal and those which are not.

The first of these lapses creates serious problems in understanding the nature of the two programs. For example, respondents suggest that teachers in the nonpublic schools participate in the administration of the Shared Time program. *E.g.*, Respondents' Brief at 22, 35, 37. As we noted in our principal brief, the record is directly to the contrary. Petitioners' Brief at 39-41.

---

[1] A detailed summary which identifies the differentiating features of each program can be found at pages 12-15 of the Joint Brief for Petitioners.

The second of these lapses (the principal examples are set forth in the margin[2]) results in the respondents' reliance on parts of the trial record not relevant to this appeal. In short, petitioners *do not* appeal those portions of the lower court rulings which concern Shared Time programming on the secondary level (with the exception of "math topics", a remedial math course), or community education courses on the secondary (high school and junior high school) level (*i.e.*, either before or after school). They *do* challenge the lower court rulings regarding the following programs:

1. Shared Time instruction on the elementary level in remedial and enrichment math, remedial and enrichment reading, art, music and physical education.

2. Shared Time instruction on the secondary level in "math topics", a remedial math course.

3. Community Education instruction on the elementary level (*i.e.*, after regular school hours, K-6 only) in voluntary, leisure-time activities.

This case does *not* involve public school instructional services which propped up financially ailing nonpublic schools

[2]

See, e.g., Respondents' Brief at pp 5 (reference to secondary community education), 6 (reference to Industrial Arts), 21 (reference to secondary community education), 26 (references to the yearbook classes which were only available on the secondary (high school and junior high) level), 31 (reference to secondary community education), 35 (reference to non-public school teachers being simultaneously employed by the GRPS and area non-public schools utilizing Appendix references which apply only to secondary community education instruction), and 37 (reference to secondary community education). Similarly, overbroad inaccuracies can be found in the amicus briefs. *See, e.g.*, American Jewish Congress brief at 2 (references to Industrial Arts and secondary community education), 5 (reference to Christian High physical education instructor), 14, 21, and 41 (references to core curriculum courses).

that did not offer their own core curriculums in conformity with state law. The instructional services in question did not have the primary effect of continuing nonpublic religiously-affiliated schools that would have otherwise closed their doors. Indeed, the record affirmatively indicates that the services did not increase the enrollment in such schools. (J.A. 221).

Finally, it is important to note that the programming under review concerns instructional offerings which are *both* non-core (*i.e.*, supplementary to the core curriculum) and non-substitutionary (*i.e.*, not otherwise available in the area non-public schools). Petitioners do not contend that it would be either constitutionally permissible or even desirable for the Grand Rapids Public Schools to provide instructional offerings which do not meet these criteria[3]. Clearly, a principled basis exists, on this record, to differentiate between the programs actually at issue in this appeal and other types of instruction.

III. Consequences of the Per Se Rule—Exaggeration Through Mischaracterization

Unlike the careful approach suggested by the Court in *Estin*, broad-brushed constitutional analysis, grounded in the fears and suspicions discussed in our introduction, lends itself quite easily to mischaracterizations of the case which grossly distort the record and impede reasoned analysis. Consequently, we find it necessary to deal briefly with such material before turning to other matters.

[3]

Respondents also hypothesize that the programs will undergo a progressive expansion. Actually, the record shows that the programs did not expand appreciably in the last four years of the six years of operation. (J.A. (¶31) 302-303).

A. **The Alleged Teachers' Salary Supplement**

For the first time, respondents now argue that the GRPS programs were designed "to confer substantial financial benefits upon the parochial school in the form of employing and paying from tax funds the teachers who teach secular subjects in leased classrooms of the parochial school building." Respondents' Brief at 21.

The courts below found, to the contrary, that "[t]he purpose of the Shared Time and Community Education programs are manifestly secular." (21a, 92a). In reaching its conclusion, the district court expressly relied upon the concession of respondents' trial counsel in this respect. (92a n.8).

We are at a loss to understand how paying public school shared time teachers a normal salary for the full-time teaching of public school courses constitutes a salary subsidy for nonpublic school teachers. GRPS paid its employees for work they performed for the school system. By contrast, in *Earley* v. *DiCenso*, 403 U.S. 602 (1972), the public school supplemented the salaries of teachers who were full-time nonpublic school employees.

The suggestion that the Community Education program is a teacher salary supplement is even more far-fetched. Again, salaries paid to teachers in this program were for services rendered in the program. They were not compensated for the academic services rendered during the regular school day. Without belaboring the point, it was quite obvious that the type of instruction involved was qualitatively quite distinct from the academic instruction of the regular school day. Likewise, there was no evidence even suggesting that the amount of compensation paid by the GRPS was in any way disproportionate to the services rendered to the GRPS. There is no constitutional prohibition against the employee of a religious

organization accepting separate and additional employment in the public sector. *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978).

In short, the implication in respondents' brief that these programs were devious, ingenious methods designed to enhance the reputation of the religious schools or to supplement the salaries of the teachers in those schools finds no basis in the record. Indeed, such an insinuation is flatly contradicted by the findings of the district court, explicitly affirmed by the Court of Appeals, that there was no purpose or intent to advance religion unconstitutionally. (21a, 92a).

B. **Alleged Racial Segregation**

Respondents' speculation, Respondents' Brief at 44-46, that the GRPS programs could be, in either purpose or effect, a vehicle to separate students by race, is without merit. Indeed, it is inappropriate. It simply ignores the record.

Respondents belatedly attempted to interject the issue of racial segregation during the trial of this case. In response, Judge Gibson ruled that "to the extent that you are attempting to show that the Community Education program or the Shared Time program fosters racial discrimination or segregation, I am going to rule you out of order. That is not part of this lawsuit and those issues are not before this Court." Record, vol. IVA, at 726.

Moreover, the racial segregation claim is groundless. The GRPS is one of the few school systems in the nation to rebut successfully a charge of de jure pupil segregation. In *Higgins* v. *Board of Education of Grand Rapids*, 508 F.2d 779, 797 (6th Cir. 1974), the court of appeals affirmed a trial court finding that "the Grand Rapids district did not engage in purposeful segregation of students. . . ." Moreover, the involved

inner-city Christian and Catholic schools have significant minority pupil enrollments. (J.A. 112, 121, 137; Record, vol. IVA, at 629-630).

C. Impact on Public Education

Clearly, respondents and their amicus supporters, like the court of appeals,[4] oppose these instructional services on leased premises in significant part because they perceive such services as a threat to the continued vitality of public education. This argument demonstrates, in stark fashion, the respondents' fundamental misconception of the role of the courts in the reconciliation of constitutional values—a misconception embodied in the *per se* solution which they urge.

Bluntly stated, as this Court has already acknowledged,[5] the judiciary has no authority to use the establishment clause for the purpose of favoring either public or nonpublic education.[6] The future of the public schools in Grand Rapids, Michigan, is the responsibility of the GRPS and the State of Michigan. Here, fully cognizant of that responsibility but also

---

[4] 49a.

[5] *Mueller* v. *Allen*, —— U.S. ——, 103 S. Ct. 3062 (1983); *Wolman* v. *Walter*, 433 U.S. 229 (1977); *Meek* v. *Pittenger*, 421 U.S. 349 (1975).

[6] Nor does the judiciary have the right to attempt to influence the constitutionally protected right of parents to send their children to the school of the parents' choice. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Consistent with their apparent mistrust of religious organizations, respondents and their supporting amici would have this Court apply the establishment clause in a manner designed to discourage parents from opting for private religiously-affiliated schools for their children. However, it is not the purpose of the establishment clause to encourage parents, in making their personal educational choices, to choose public schools rather than religiously-affiliated nonpublic schools. *Mueller* v. *Allen*, —— U.S. ——, 103 S. Ct. 3062 (1983).

aware of the educational needs of all its citizens, the locally elected public school board, consistent with state law, expanded the provision of supplemental public school instructional services to educationally needy and gifted children under conditions of public school control. This expansion of public education opportunities, by public school authorities, did not result in any decline in public school enrollment or support. Indeed, these programs resulted in the GRPS receiving an additional three million dollars in state funds with which to increase the educational opportunities available for full-time public school students. (7a n.6). As a factual matter, the instructional services at issue did not bolster religiously-affiliated nonpublic schools at the expense of public schools. (J.A. 221).

IV. Consequences of the "Per Se Rule"—Ignoring the Record

Reliance on broad brush *per se* rules not only induces a good deal of mischaracterization, it also results in a distinct lack of precision in factual analysis. We turn now to correct the misimpressions left by respondents' inattention to the record.

A. Student Body Identity

Although this Court has already stated that student body identity is not, taken alone, a constitutionally determinative factor in establishment clause analysis, *Wolman* v. *Walter*, 433 U.S. 229, 246-247 (1977), respondents suggest that this factor also ought to be applied as a *per se* rule of invalidity.

Here, the identity of the student body, at least with respect to the Shared Time program,[7] resulted from the decision

---

[7] In the elementary community education context, some crossovers occurred where children would attend community education classes at buildings other than the buildings which they otherwise attended during the regular school day. (J.A. (§218) 350).

of the GRPS to provide the course offerings to *all* children of the district at their school of primary attendance. The establishment clause implications of such a decision, as the Court noted in *Wheeler* v. *Barrera*, 417 U.S. 402, 426 (1974), require a careful evaluation of the facts. As we noted in our principal brief, here in Grand Rapids, that decision was based on the practical considerations of, first, lack of space in GRPS owned school buildings, second, prohibitive transportation costs, and third, the desire to eliminate unnecessary pupil transportation which would detract from the overall educational effectiveness. Petitioners' Brief at 11. Certainly, such a commonsense arrangement, cannot, by itself, be considered violative of the establishment clause. Here the record affirmatively shows that the identity of the student body caused no other impermissible effects. Curriculum, teaching methods, and class discipline were all under the control of GRPS. Petitioners' Brief at 16. The students were taught in precisely the same manner as full-time public school students in GRPS owned buildings.

B. **Excessive Entanglement**

The record affirmatively demonstrates that the contacts between the GRPS personnel and personnel of the nonpublic schools were minimal and involved no extensive and protracted dealings. There was no controversy over the conduct of the Shared Time courses or their administration.

Faced with this record, respondents—like the court of appeals—must rely on a *per se* rule based solely on location. Although extensive discovery and an eight-day trial produced no evidence of impermissible entanglement, respondents persist in maintaining that simply because of the location of the classes, reality must be different than the facts in the record. We submit that, while respondents and other individuals are

free to form their conclusions on the basis of such stereotypes, courts ought to decide cases on the basis of the record.

Respondents attempt to justify a *per se* geographic rule with respect to entanglement by suggesting a series of "what ifs." These suggestions take significant liberties with the record and we now turn to correcting the most important errors.

1. **The Professionalism of the GRPS Teaching Staff**

Although, through discovery and an eight-day trial, they were unable to find a single instance of a GRPS Shared Time or Community Education teacher fostering religion or engaging in impermissible contacts with the nonpublic school personnel, respondents continually suggest that such instances must have regularly occurred. *E.g.*, Respondents' Brief at 29, 30. However, as this Court noted in *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 660-61 (1980), a court ought not read into a plan "as an inevitability the bad faith upon which any future excessive entanglement would be predicated." Moreover, it is not difficult to perceive a certain time-lag in respondents' "what if." Twelve years after *Lemon*, the professional public educator—and, for that matter, the professional nonpublic educator—have made, on the basis of this Court's frequent pronouncements, the necessary adjustments in their professional relationships. The teachers involved in these programs knew their jobs—and part of their jobs was knowing how to deal with public-religious encounters. We have set out in some detail in our principal brief, Petitioners' Brief at 38, how the GRPS instructed its teachers in this regard. These teachers were subject to the same classroom observation and evaluation process on leased premises that was utilized for all other full-time public school teachers

in the GRPS owned buildings.[8] (J.A. (¶156) 330). This evaluation process was designed to ascertain secular teaching competence. A by-product was to verify that GRPS teachers, consistent with the Shared Time Guidelines (J.A. 214), were not advancing religion.

2. Administrative Relationships

The respondents similarly suggest countless *possibilities* for entanglements at the administrative level. The record is to the contrary, however. As noted in our principal brief, Petitioners' Brief at 40, the record revealed that the contacts between GRPS officials and the nonpublic school administrators merely involved (1) distributing information about the program; (2) processing requests for the receipt of such services; and (3) scheduling the courses and related matters. Shared Time teachers were transient and had little time for contact with nonpublic administrators. (J.A. (¶13) 70). Materials and supplies were purchased by the GRPS and were not used by the nonpublic schools. (J.A. (¶¶188-192) 341-342). Respondents wholly failed to produce any record evidence of controversy or friction between public and nonpublic school authorities in the implementation and operation of the challenged programs.

3. Role of Nonpublic School in Teacher Assignments

Respondents argue that the nonpublic school authorities "maintained considerable control" over the assignment of Shared Time teachers because, in their words, "so many" of them were sent "back to school buildings where they had

---

[8]

As Justice Blackmun noted in *Wolman* v. *Walter*, "[i]t can hardly be said that the supervision of *public* employees performing *public* functions on *public* property creates an excessive entanglement between church and state." 433 U.S. at 248 (emphasis supplied).

taught as employees of" the area nonpublic schools. Respondents' Brief at 35-36. Simply put, the record does not support their contention.

Of the 131 Shared Time teachers providing shared time instruction during the 1981-1982 school year, only 13, or approximately 10%, previously taught in area nonpublic schools. (J.A. 193)[9]. In a school district with such a high number of religiously-oriented schools (both absolutely and as a percentage of the total number of schools), this is hardly excessive. It is plainly unrealistic to expect the GRPS to fulfill all its staffing requirements without utilizing the services of some teachers who, at some time in their career, taught in some religiously-oriented school. More importantly, the uncontroverted record established that, in each instance, nonpublic schools did not exercise any input into or control over the shared time teacher assignment process. (J.A. (¶202) 344).[10] The understanding of the area nonpublic school administrators on this point is typified by the trial testimony of principal John Jaksa (principal of St. Stephens) when he stated:

> Q. The teachers, public school teachers that have been assigned to perform their services at St. Stephens' location are supervised and evaluated by Grand Rapids Public

---

[9]

Because secondary Shared Time (with the exception of "math topics") is no longer at issue in this case, the number "13" should be reduced to account for those secondary teachers employed by the GRPS who were formerly employed by area nonpublic schools. When so evaluated, the percentage of GRPS Shared Time teachers previously employed by area non-public schools is significantly reduced from the 10% figure established at trial.

[10]

Neither of the lower court opinions made any finding to the effect that nonpublic school administrators either attempted to control or in fact controlled the teacher assignment process in the operation of the Shared Time program. (75a-76a).

School employees and not you or anyone else on the St. Stephens' staff, am I correct?

A. Correct.

Q. Neither you nor anybody else that you know of that's on the staff or board or whatever of [St. Stephens] . . . to your knowledge, had any input as to which teacher would or would not be assigned to the St. Stephen's facility for shared time purposes?

A. We have no input.

Q. You have not had any input?

A. Correct, no, sir.

Record, vol. IVA, at 733. Or, as observed by principal Ronald Boss (principal of Oakdale Christian School):

Q. Mr. Boss, with reference to the reading teachers whose names you just recited, am I correct that you had nothing to do with the decision as to them being assigned to your building?

A. That's correct.

Q. And, you understand and have acted with the understanding that any Grand Rapids public school personnel assigned to the Oakdale Christian building are Grand Rapids employees and not—

A. Yes, they are.

Q. And not the association's employees?

A. No, sir.

Q. And, you have understood and acted with the understanding as far as supervision or evaluation of those

personnel that that's up to the Grand Rapids Public School and not to you or anybody else associated with the Oakdale Christian School?

A. And they do.

Record, vol. IVA, at 651-652.

4. Political Divisiveness Along Religious Lines

Relying on the stereotypes born of their *per se* rule, respondents and their amici continue to argue that, despite their failure to establish the proposition at trial, this program presents an impermissible potential for political divisiveness. Since they have not been able to establish that the GRPS programs have that infirmity, they must, in effect, urge the sterotypical notion that any program of this sort presents such impermissible potential for entanglement.

First, we submit that an inquiry into whether the program has the potential for political divisiveness is not relevant in this case. The GRPS program is not "a direct subsidy to church-sponsored schools and colleges or other religious institutions," *Lynch* v. *Donnelly*, —— U.S. ——, 104 S. Ct. 1355, 1364-65, (1984); *Mueller* v. *Allen*, —— U.S. ——, 103 S. Ct. at 3062, 3071 (1983). In purpose and effect, it provides educational services for *all* the *children* of Grand Rapids.

Nevertheless, even if such an inquiry were appropriate, the argument is without merit. At trial, respondents did not produce any evidence to suggest that either the Shared Time or Community Education programs fostered political divisiveness along religious lines. Indeed, the only testimony pre-

sented at trial proved the exact opposite.[11] (J.A. 155, 205). As noted by board president Pojeski:

> Q. Can you tell the court whether or not the providing of these courses on the nonpublic site has been a divisive issue or a dividing issue as far as the community is concerned?
>
> A. If anything, I would have to say the reverse was true. . . .
>
> Q. Since you have been on the Board of Education . . . is it the same thing there or is it different, has it been divisive or has it not been that?
>
> A. Well, in my own personal . . . experience, it has never been a campaign issue at any time.

Record, vol. VA, at 905-906. Or, as stated by previous board president Alland:

> The Shared Time courses and instruction offered by the Grand Rapids Public Schools have not been a politically divisive issue between the members of the Board of Education, nor has it been an issue in any school board election campaign, or in a school millage election campaign. I do not believe the Shared Time program has been a

[11] The court of appeals' and district court's characterization of the discussion of the programs during the March 1980 millage election is without support in the record. (27a, 44a). Political *discussion* of the programs does not mean that there was religiously-based divisiveness. Indeed, it was quite proper for the GRPS to emphasize that these programs benefited the entire community. Parents with children in public schools needed to know that these programs resulted in more state funds for public schools. Parents of children in non-public schools needed to know that these children would also benefit from certain public school programs. Petitioners' Brief at 43.

> divisive issue in the community. In fact, it is my belief that the program has been very successful and that it has been well received by the entire community.

(J.A. 205). The same situation obtains on the state level as evidenced by the trial testimony of Robert Hornberger of the Michigan Department of Education.

> I have not observed any political controversy in terms of attempts to change the statutes and administrative rules that provide school districts with a discretionary authority to provide Shared Time instruction on premises leased from nonpublic schools and receive state school aid payments for part-time public school students who are also enrolled in nonpublic schools.

(J.A. 155). Such testimony should hardly be surprising. *Wolman* v. *Walter*, 433 U.S. at 263, Justice Powell made special note of the growing capacity of Americans to deal maturely with civil-religious relationships. "The risk of significant religious or denominational control over our democratic processes —or even of deep political division along religious lines—is remote. . ."

Nor does respondents' eleventh hour reliance on the post-appeal resolution of the State Board of Education, Respondents' Brief at 48-49, have any relevance in this regard. As we noted in our brief, Petitioners' Brief at 4 n.6, the resolution of the board is simply a somewhat premature expression by a lay board of its opinion regarding the legal merits of this case—an opinion not shared by the Attorney General of Michigan who has the constitutional and statutory authority to determine the legal position of the state. Nor does it indicate that, once the constitutional issue is resolved by this Court, the program

will engender any religiously-based political divisiveness within the community.[12]

In short, respondents ask this Court to undertake a task which Justice O'Connor has termed "simply too speculative an enterprise." *Lynch* v. *Donnelly*, —— U.S. ——, 104 S. Ct. 1355, 1367 (1984). The political divisiveness inquiry always

---

[12]

Likewise, respondents' half-hearted suggestion of mootness, made in passing at the same point, is not well founded. The board did not purport to compel Michigan school districts to terminate Shared Time programs. Indeed, during the board's existence under Mich. Const. art. 8, §3, it has never purported to exercise any authority to compel school districts to terminate programs authorized by the Michigan legislature. The Michigan Constitution is a limitation on the otherwise plenary powers of the Michigan legislature. *Huron-Clinton Metropolitan Authority* v. *Boards of Supervisors*, 300 Mich. 1, 12, 1 N.W. 2d 430, 433 (1942). The Michigan Supreme Court has never held that, pursuant to Mich. Const. art. 8, §3, the State Board of Education may compel school districts to terminate programs that have been authorized and funded by the Michigan legislature. To the contrary, the Michigan Supreme Court recently reiterated the long standing rule that "[s]chool districts possess such power as statutes expressly or by reasonably necessary implication grant to them." *Jurva* v. *Attorney General*, 419 Mich. 209, 214 (1984). See also *Senghas* v. *L'Anse Creuse Public Schools*, 368 Mich. 557, 118 N.W.2d 975 (1962). In *Traverse City School District* v. *Attorney General*, 384 Mich 390, 411 n.3, 185 N.W.2d 9, 17-18 n.3 (1971), the Michigan Supreme Court noted that the authority for school districts to establish Shared Time programs is derived from "statutory language." The Court went on to hold that, in 1955 Mich. Pub. Acts, No. 269, §583, the predecessor to 1976 Mich. Pub. Acts, No. 451, §1282, Mich. Comp. Laws §380.1282 (1979), the legislature had authorized the establishment of Shared Time classes on premises leased from nonpublic schools. Similarly, the exclusive authority of the Michigan legislature to appropriate state funds for the state treasury is beyond dispute. *See* Mich. Const. art. 9, §17, *Board of Education of Detroit* v. *Superintendent of Public Instruction*, 319 Mich. 436, 453, 29 N.W.2d 902, 910 (1947), *Regents of the University of Michigan* v. *Labor Mediation Board*, 18 Mich. App. 485, 490, 171 N.W.2d 477, 479 (1969).

brings the risk of stifling discussion and creative resolution of important community issues. When, as here, a community has demonstrated—on the record—that its officials have developed and implemented for six years a program acceptable —and beneficial—to the *entire* community, such judicial speculation is, we submit, especially intrusive and destructive.

CONCLUSION

In *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932), Justice Brandeis wrote:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of a federal system that a single courageous State may, if its citizens choose, serve as a laboratory. . .

Respondents, by urging that this Court adopt a *per se* rule, ask that it cut off such experimentation. The "interaction between courts and states" described by this Court in *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 662 (1980), would be stifled or, more precisely, choked off entirely.

Petitioners submit that such interaction is essential to a just reconciliation of the values protected by the Religion Clauses and the responsibilities of the states to provide education for all the people. We further submit that the Grand Rapids program is an "experiment" that has worked. Its success has been established on the record. The local school board, representing a community where religious beliefs are diverse and important, carefully developed a program to provide the community's young with supplementary educational assistance. It molded the programs which avoided advancing religion and the possibility of excessive administrative entanglement with-

out creating the potential for political divisiveness. It implemented the programs for six years without a problem. When called upon to justify it in federal court, it produced a record which demonstrated both its good faith and its constitutional results. It now asks simply that its efforts not be judged by stereotypes or by the respondents' "what ifs." Its people have the right to enjoy the fruits of their careful planning.

For the foregoing reasons, the petitioners respectfully request a reversal of the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Gerald F. Young
Assistant Attorney General

Kenneth F. Ripple
Special Assistant Attorney General

Attorneys for Petitioners
Runkel, et al

Business Address:
750 Law Building
525 West Ottawa
Lansing, MI 48913
(517) 373-1124

William S. Farr
John R. Oostema
Kenneth F. Ripple
(Special Counsel)

Attorneys for Petitioner School District of City of Grand Rapids

Business Address:
3rd Floor,
Campau Square Bldg.
180 Monroe, N.W.
Grand Rapids, MI 49503
(616) 459-3355

Stuart D. Hubbell
Kenneth F. Ripple
(Special Counsel)

Attorneys for Petitioners
Aguilar, et al

Business Address:
400 E. Eighth
Traverse City, MI 49684
(616) 947-5600

September 17, 1984